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Metaphysical and Ethical Skepticism in Legal Theory

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METAPHYSICAL AND ETHICAL SKEPTICISM IN LEGAL THEORY

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I. INTRODUCTION

The following two propositions frame the classic debate about the link between legal metaphysics and ethics:

> (1) The law is a fiction—merely a construct of lawyers' arguments and the relatively arbitrary action of decision makers.
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> (2) A judge should state that the law stands for whatever result the judge deems to be correct.

Legal skeptics believe some form of (1), a proposition of metaphysics. Opponents of legal skeptics (call them idealists) typically claim the skeptic also believes (2), something that looks like a proposition of ethics. The idealist then identifies (2) with nihilism—the belief that there are no valid or true ethical principles. This essay examines the debate between skeptics and idealists in light of a detailed examination of one idealist's attempt to paint skeptics as nihilists, concluding that not only are idealists unfair to their skeptical colleagues, but that historically skeptics have often proposed substantial reforms to the legal system based on deeply held moral beliefs.

The essay begins by reviewing twentieth century idealist attacks on skeptics, showing the long and vigorous idealist tradition of treating skeptics as nihilists. Second is a brief discussion of the philosophical debate concerning the "fact/value distinction," a distinction that plays a central role in the skeptic/idealist debate. Third, the essay introduces a version of the idealist attack on skeptics focused on the ethics of the practicing lawyer, considering first how this idealist attack matches various possible pictures or representations of what the legal profession is and does, and then considering the logic of the argument in detail, showing that nihilism is not a logical consequence of legal skepticism. Finally, the essay shows that historically, far from being nihilists, legal skeptics typically use skepticism in the service of a deeply held reformist or revolutionary moral agenda.

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II. HISTORICAL CONTEXT

Throughout this century, idealists have repeatedly accused skeptics of being no more than amoral nihilists.[1] For example, critics of Jerome Frank's skeptical theories found in them "a desire to exalt brute power and official arbitrariness at the expense of the right, the orderly, the lawful, and the just."[2] Thus, idealist critics of legal skeptics have avoided reasoned analysis of skeptical argument on its own terms, instead implying or asserting that the skeptic's denial that morality is intrinsically part of the law is the same as the denial of morality *tout court.*

In the 1940s, a group of Jesuit scholars not only accused Justice Holmes of advocating the position that "might makes right," but warned that adherence to a Holmesian jurisprudence had led to Nazism in Germany and could lead to totalitarian rule in this country.[3] A characteristic outburst shows the violence of these criticisms: "This much must be said for Realism. If man is only an animal, Realism is correct, Holmes was correct, Hitler is correct."[4]

While the Jesuits' position seems extreme, even more temperate commentators took the link between legal skepticism and Nazism seriously. The famous debate between H.L.A. Hart and Lon Fuller, on the separation of law and morals,[5] focuses in part on the arguments of Radbruch. Radbruch was a German philosopher who abandoned his prewar positivism precisely because he came to believe that positivist views were partly responsible for Nazism.[6] One might expect that a distinguished legal theorist like Fuller would reject out of hand the claim that Nazism somehow followed from, or was particularly compatible with, positivism. Instead, Fuller appeared to endorse the claim, stating:

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1. *See* Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1216-17 (1981) (discussing this phenomenon).

2. *See* K.N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COL. L. REV. 581, 601 (1940) (describing reactions to Jerome Frank's attempt to use psychoanalytic theory to explain why lawyers mistakenly—according to Frank's skeptical views—believed that rules of law determine results in cases).

3. *See* G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 65-67 (1971) (describing the attacks made on Holmes in five articles: John C. Ford, *The Fundamentals of Holmes' Juristic Philosophy*, 11 FORDHAM L. REV. 255, 275 (1942); Paul L. Gregg, *The Pragmatism of Mr. Justice Holmes*, 31 GEO. L.J. 262, 284, 293-94 (1943); Francis E. Lucey, *Jurisprudence and the Future Social Order*, 16 SOC. SCI. 211 (1941); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 512, 531 (1942); Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A. J. 569, 571-73 (1945)). While these articles attacked every segment of Holmes' philosophy as immoral, it is clear that they viewed his skepticism about law to be inextricably linked to the encouragement given by his philosophy to totalitarianism.

4. Lucey, *Natural Law and American Legal Realism*, *supra* note 3, at 531.

5. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

6. Fuller, *supra* note 5, at 657-61; Hart, *supra* note 5, at 617-18.

> Let us put aside at least the blunter tools of invective and address ourselves as calmly as we can to the question whether legal positivism as practiced and preached in Germany, had, or could have had, any causal connection with Hitler's ascent to power. It should be recalled that in the seventy-five years before the Nazi regime the positivistic philosophy had achieved in Germany a standing such as it enjoyed in no other country . . . .
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> . . . I cannot see either absurdity or perversity in the suggestion that the attitudes prevailing in the German legal profession were helpful to the Nazis. Hitler did not come to power by a violent revolution. He was Chancellor before he became the Leader. The exploitation of legal forms started cautiously and became bolder as power was consolidated. The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle.[7]

Fuller's "calm" discussion shows how easily idealists convinced themselves that skepticism denied morality. Fuller appears unwilling to investigate the paths open to a positivist, on the one hand, and an idealist, on the other, to confront an immoral legal regime. By stressing the separation of law and morals, positivism allows its adherent to identify for herself the moral beliefs she holds paramount. Such a positivist, living in Germany during the rise of Nazism, would have been free to assess the changes in the law enacted by the Nazis and the morality of those changes. If the positivist concluded that a rule of law enacted by the Nazis was immoral, the positivist would then be forced to ask "the final moral question: 'Ought this rule of law to be obeyed?'"[8] The situation of the idealist would have been similar. An idealist who believes, in general, that law is inherently moral would have had to make a comparable "final moral judgment": Is this purported Nazi rule of law, actually a law, or really a lawless act of an immoral government? In other words, neither idealist nor positivist theory compels the lawyer to embrace a noxious doctrine like Nazism, nor do they compel her to oppose it. As Professor Hart pointed out, the real question is why the distinction between law and morals acquired a sinister character in Germany, while elsewhere, for example with the Utilitarians, it "went along with the most enlightened liberal attitudes."[9] The failure of idealists such as Fuller to appreciate this rather simple insight shows the extreme visceral reaction positivism has evoked in its opponents.

Even rather innocuous expressions of legal skepticism have met with withering criticism. Judge Thurman Arnold, a skeptic of the legal realist school, contended in a debate with Henry Hart that in criticizing the com-

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7. Fuller, *supra* note 5, at 658-59.
8. Hart, *supra* note 5, at 618.
9. *Id.*

petence of contemporary judicial opinions, Hart had simply dismissed as poorly reasoned any opinion that disagreed with his own views on the subject.[10] As a secondary point, Arnold contested the theory of judicial deliberation relied upon by Hart, in the voice of a practitioner correcting the unrealistic picture of an academic.[11] As to deliberation, contra Hart, Arnold maintained that "there is no such thing as a process of maturing of collective thought, no such thing as a process of reason, no such thing as decisions rigorously governed by principle," in deliberations of the Supreme Court (or, by extension, deliberations of other judges).[12] Arnold offered as an alternative that a court composed of "men of widely differing experience representing many facets of American thought," will express conflicts that will add to the growth of American law.[13]

Despite the context of the debate, and the clear implication that law could grow and reach good results through discussion between judges of diverse viewpoints, Alexander Bickel responded emotionally to Arnold's view:

> This is cynicism pure and simple. And here, as in other realms, cynicism is what the late Henry L. Stimson called it: "the only deadly sin." As always, there is no reply to be made to it other than that if the estimate of reality on which it feeds is in any degree correct, then the reality must be changed to exactly that degree. The sin is mortal, because it propagates a self-validating picture of reality. If men are told complacently enough that this is how things are, they will become accustomed to it and accept it. And in the end, this is how things will be. That is the reason such a view, or non-view, of the judicial process as Judge Arnold's must be noticed and seen for what it is.[14]

The idealist, Bickel, violently attacks the perceived nihilism of the skeptic, not seeing that the skeptic has proposed an alternative picture of how the law can be moral, but insisting rather that the skeptic has simply embraced immorality.

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10. Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1317 (1960); *see* Henry M. Hart, Jr., *The Time Chart of the Justices, The Supreme Court 1958 Term*, 73 HARV. L. REV. 84 (1959).

11. Arnold stated:

> But if Professor Hart had ever tried to hold together a majority in favor of an opinion which he had written (as I have done on occasion) he would know that compromise in the form of an ambiguity may be inevitable. He would find that he would have to put in something which he believes created an ambiguity in order to avoid provoking a dissent or a concurring opinion which would create even more ambiguity since the Court would be unanimous only on the result. He would find that men can sometimes agree on a result, but rarely on all of the reasons for that result, and that attempts to spell out reasons may be futile.

Arnold, *supra* note 10, at 1312.

12. *Id.* at 1311-13.

13. *Id.* at 1314.

14. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 84 (1962) (citation omitted).

Ronald Dworkin, the most influential contemporary idealist, has taken a similarly hard, emotional line against skeptics. Opposing the positivist who claims that there is no "right" answer to hard legal questions—seemingly a metaphysical claim—Dworkin responds that "the controversy is really about morality, not metaphysics, and the no-right-answer thesis, understood as a moral claim, is deeply unpersuasive in morality as in law."[15] Later in the same book, Dworkin refers to "the cynic's mocking discovery that it [law] is nowhere at all."[16] Still later, in summarizing an argument against positivism, Dworkin again reaches for ethical (and perhaps even aesthetic) judgments:

> These bizarre conclusions [that Dworkin claims to have drawn from positivism] must be wrong. Law is a flourishing practice, and though it may well be flawed, even fundamentally, it is not a grotesque joke. It means something to say that judges should enforce rather than ignore the law, that citizens should obey it except in rare cases, that officials are bound by its rule.[17]

Once again we see the idealist's refusal to analyze a skeptical claim on its own terms. Instead, the idealist insists on seeing an attack on idealism as an attack on his morality. The idealist therefore emotionally denounces as "bizarre" and "grotesque" any position differing substantially from his own.

In sum, there is a very strong strain in the idealist position which holds that an adherent to legal skepticism must be, at best, a nihilist. Hence, the ethical consequences of legal skepticism are allegedly so repugnant that they justify the rejection of legal skepticism without further ado.

III. THE FACT/VALUE DISTINCTION

Metaphysics is concerned, in the most general sense conceivable, with describing the world. The metaphysician may ask what is the nature of law. Are laws nonphysical entities that exist in some different plane of reality? Are laws like mathematical rules? Are society's laws like the laws of science? Are laws entities, such as ideas in the mind or concepts in language? In contrast, ethics is concerned, in a similar general sense, with how to value and act in the world. The ethicist may ask whether there is a duty to obey the law simply because it is the law, or inquire into the relationship between morality and law.

No readily apparent, necessary link exists between the kind of questions considered in the metaphysics of law and the kind of questions considered in the ethics of law. That an "ought" cannot be derived from an "is" is a cliché of metaphysics. An ethical principle cannot be derived as

15. RONALD DWORKIN, LAW'S EMPIRE at ix (1986).
16. *Id.* at 9.
17. *Id.* at 44.

a necessary consequence from a metaphysical (or physical) principle.[18] This cliché is not universally accepted, and in some sense is at the heart of the dispute that concerns this essay, since idealists want to argue that certain (bad) value judgments follow from a skeptical position. The linguistic formulation of the fact/value distinction, that no conclusion containing an evaluative term may be deduced unless the evaluative term is present in the premises,[19] follows straightforwardly from the view that logic does nothing more than make explicit what is implicit in the meanings of the premises. Therefore, we can view the linguistic formulation as a methodological admonition, rather than a demonstrable truth. Whenever an argument purports to deduce an evaluative judgment from plain statements of fact, examine the statements of fact to see if you can identify a hidden evaluative premise.

There are three interesting ways to attack the linguistic fact/value distinction. First, the antidescriptivist may argue that language is so intertwined with purposes that an evaluative component may not be analyzed out of language. Second, the antidescriptivist may argue that language always presupposes moral beliefs, so that a separate descriptive component cannot be analyzed out of language. Third, the antidescriptivist may analyze language as a human behavior, in the context of human institutions and cultures that presuppose certain values, so that an attempt to analyze out descriptive and evaluative components separately from these institutions and cultures must always be incorrect. While the disputes over these attacks are too intractable to resolve in any short (or long) discussion, this essay sets forth reasons why the fact/value distinction should be retained as a methodological tool.

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18. *See, e.g.*, R.M. HARE, THE LANGUAGE OF MORALS 32 (Clarendon Press 1982) (noting "an imperative cannot appear in the conclusion of a valid inference, unless there is at least one imperative in the premisses"); DAVID HUME, A TREATISE OF HUMAN NATURE 470 (2d ed., Selby Bigge Clarendon Press 1978) (the source of this insight); G.E. MOORE, PRINCIPIA ETHICA 67-69 (Thomas Baldwin rev. ed., Cambridge Univ. Press 1993) (exploring the open question argument, pointing out that after any description of a state of affairs, it is still an open question whether that state of affairs is good). It may be noted that this distinction is parallel to the distinction drawn between observational and theoretical terms in the logical positivist theory of science. *See, e.g.*, JOHN LOSEE, A HISTORICAL INTRODUCTION TO THE PHILOSOPHY OF SCIENCE 190 (2d ed. 1985); Rudolf Carnap, *Foundations of Logic and Mathematics* 143-45, 202-09 *in* 1 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE pt. I (O. Neurath & R. Carnap eds., 1955). This second distinction is undermined by the insight that all language and observation seems to be colored by context and world view so that all observations are to some extent theory laden. *See, e.g.*, NORWOOD RUSSELL HANSON, PATTERNS OF DISCOVERY: AN INQUIRY INTO THE CONCEPTUAL FOUNDATIONS OF SCIENCE 85-92 (1958); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111-23 (2d ed. 1970); LOSEE, *supra*, at 190-92, 197-200, 205; Paul Feyerabend, *An Attempt at a Realistic Interpretation of Experience*, 58 PROC. ARISTOTELIAN SOC. 143, 148-49, 160-64 (1958). Whether the interdependence between observation and theory terms in the area of science can be shown to be parallel with an interdependence between description and evaluation terms in the area of ethics is briefly discussed below.

19. *See, e.g.*, HARE, *supra* note 18, at 28-31; J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 72-73 (1977).

A. *Is There a (Separable) Evaluative Component in Language?*

The antidescriptivist may argue that a linguist cannot analyze out of certain words any covert evaluative component. This is so, the argument goes, because all language is to some extent theory-laden, and so some language is evaluative theory, or value-laden.[20] Hence, the antidescriptivist might claim that there are "thick" ethical terms, like bravery, cowardice, charity, and so forth, that interweave the descriptive and the evaluative inextricably.

The antidescriptivist claim fails for a couple of related reasons. First, the antidescriptivist cannot give a satisfactory account of the error in analyzing a thick ethical term into a descriptive and an evaluative component. The typical antidescriptivist objection is that to know the meaning of a thick ethical term, one cannot rely on a "mere" description. Instead, one must know the purpose for using the term. According to the antidescriptivist, the purpose will be inextricably linked, not to description, but to evaluation.[21] For example, terms such as "coward, lie, brutality" and "gratitude" are said to be linked to their function, their role in the way people live, in a way that mere description cannot capture.[22]

While the objection that "description" cannot capture "function" raises a mare's nest of issues in the theory of language, the resolution of these tangled issues turns out not to be relevant to the success of the objection. In the early twentieth century, an "atomistic" picture of language was set forth which has the following properties: the principal aim of language is to describe reality by constructing sentences that correspond to the world; the meaning of language is built up from the meanings of each of its parts; the core units for analysis of language are the word and the sentence; and each word (or sentence) can be analyzed into a "true" logical form.[23] The claim that thick ethical concepts can be analyzed into covert descriptive and evaluative components is taken to be a claim of this school of linguistic analysis. In contrast, and in revolt against this school, some philosophers of language claimed that language should be treated as an artifact, a tool just like other tools we use. Hence, language must be described as part of practices or conventions or forms of life.[24]

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20. *See, e.g.*, BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 141-42 (1985); Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1205 n.36 (1994).

21. *See* WILLIAMS, *supra* note 20, at 141-42; Philippa Foot, *Moral Beliefs* 83, 85, 92 *in* THEORIES OF ETHICS (Philippa Foot ed., 1967); Feldman, *supra* note 20, at 1212 n.42.

22. *See* WILLIAMS, *supra* note 20, 140-41.

23. *See, e.g.*, Bertrand Russell, *Introduction* to LUDWIG WITTGENSTEIN, TACTATUS LOGICO-PHILOSOPHICUS 7-21 (Tactatus trans., C.K. Ogden Routledge & Kegan Paul Ltd. 1985); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 1, at 2-3 (G.E.M. trans., Anscombe Macmillan 3d ed. 1989).

24. *See, e.g.*, WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 23, § 11, at 6 ("Think of the tools in a tool-box: there is a hammer, pliers, a saw, a screw-drive, a rule, a glue-pot, nails, and screws. The functions of words are as diverse as the functions of these objects."); *Id.* § 23,

Since words are interrelated with each other and other behavior as part of a practice, it is fundamentally mistaken to attempt to assign individual meanings to individual words.

If the correct theory of language were not "atomistic," but instead "holistic," then meanings could not be parceled out to individual words. Instead, the meaning of language would depend on the seamless interconnection of all words with each other and with the practices in the world and forms of life the words described. If the holistic theory were correct, we could not winnow out, for one individual word, a separate descriptive component.

The holistic objection to atomistic theory is fair, but irrelevant to the fact/value distinction. What we must ask is: Is it intelligible to speak of a particular practice in terms of its "function," and in terms of the reasons for action someone engaging in that practice may have, without ourselves adopting or endorsing that practice? If so, we can separate some kind of (holistic) description from (moral) evaluation.

I have yet to see an example where description and evaluation cannot be separated in this way, so it seems wise to use the fact/value distinction as a methodological tool, until such an example is put forth. Hence, while we cannot treat words atomistically if we must treat them as a part of practices, we can still distinguish between description and evaluation. Just as words can be analyzed on the atomistic theory, practices can be analyzed on the holistic theory.[25] In sum, the possibility that the correct theory of language may be holistic appears, in and of itself, to have no bearing on the issue of whether description may be distinguished from evaluation.

B. *Is There a (Separable) Descriptive Component to Language?*

The antidescriptivist may make a different kind of holistic claim, namely that "thick concepts" are parts of world views that are theories of the world in the same way that scientific theories are theories of the world. The holist might claim that scientific theories are theory all the way down—for example, one can see observations of the sky as either observations of celestial bodies circling the earth or observations of the apparent movement of celestial bodies caused by the movement of the earth beneath the feet of the observer.[26] A holist would argue that an ob-

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at 11 ("Here the term 'language-*game*' is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.").

25. Of course the analysis does not show what is *really* going on, in the sense that saying water is *really* H_2O shows the *real* chemical structure of water, but the analysis is nevertheless a useful way of describing what is going on, just as something may be usefully described as either a valiant exhibition of courage or a quarterback sneak (while not *really* being more one than the other) depending on our purpose. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 23, § 22, at 10-11.

26. *See, e.g.*, LOSEE, *supra* note 18, at 190-92; Feyerabend, *supra* note 18, at 160-64.

servation of the world cannot be described, even in the most basic terms, without invoking a theory. Similarly, one could argue that the use of "thick" ethical terms is colored by theory, such that no purely descriptive component could be separated out. The analogy does not destroy the usefulness of the fact/value distinction, since, relative to any particular purpose, and for any scientific activity, we can distinguish between observational and theoretical components. For example, a physicist can distinguish between "seeing" the paths of sub-atomic particles (theory) and describing patterns of bubbles in a cloud chamber (observation).[27] Similarly, relative to any evaluative activity, like praising brave acts, for the meaning of "brave" I can separate out an evaluative component (praise) from the descriptive (seeing someone take an action that risks personal injury to achieve some goal). Hence, while the fact/value distinction may not be an absolute distinction, relative to any specified level of description, i.e., a set of firmly held beliefs, one can distinguish fact from value.

C. *Is Language Analytically Separable from Human Institutions?*

The third attack on the fact/value distinction, related to the analogy to scientific theories, is based on the claim that language has a function in institutions. The simple, but seminal, form of the modern attack on this distinction is that, if we understand the meaning of terms like promise, we can see that evaluative conclusions do follow from descriptive premises. For example, from the sentence "Jones stated 'I promise to pay Smith five dollars,'" we can infer that "Jones ought to pay Smith five dollars."[28] This example shows that certain institutions or practices, if accepted, entail value judgments. To accept the institution of promising is to accept that promises ought to be kept.

Nonetheless, the fact/value distinction is still useful. The proposition: "John ought to pay Smith five dollars," is properly seen as established only relative to some unexpressed presuppositions. One presupposition would be that the full conclusion ought to be: "Someone who accepts the institution of promising must believe that 'John ought to pay Smith five dollars.'" An alternative is that the argument presupposes the premise: "The value judgments implied by the application of the institution of promising to facts in the world are objectively true."[29] We can understand that there is an institution of promising that requires that promises be kept, and still wonder whether one "ought" to accept that institution, either altogether, or at any particular instant. We can describe

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27. *See, e.g.*, LOSEE, *supra* note 18, at 192.

28. *See* John R. Searle, *How to Derive an "Ought" from an "Is,"* 73 PHIL. REV. 43, 44 (1964).

29. *See* MACKIE, *supra* note 19, at 64-72 (presenting a cogent assessment of the significance of Searle's "ought" to "is" derivation).

the facts of an institution without in any way endorsing or accepting the institution.

IV. PICTURES OF THE LEGAL PROFESSION

Historically, legal theory is judge-centered, but it does not need to be. The skepticism/idealism dispute can be recast to focus on lawyers. We considered two propositions above as framing the debate between skeptics and idealists:

> 1) The law is a fiction—merely a construct of lawyers' arguments and the relatively arbitrary action of decision makers.
>
> 2) A judge should state that the law stands for whatever result the judge deems to be correct.

A plausible analogue for proposition (2) is

> 2') A lawyer should do whatever her client wishes—she should argue that the law stands for whatever result her client desires.

In parallel with the morality-based attacks leveled against judge-centered skeptical theories, one commentator, David Luban, has argued that something like proposition 2' follows from legal skepticism, that 2' is repugnant, and that therefore legal skepticism is a false metaphysical position.[30] A critical reading of his arguments illustrates the difficulty, if not impossibility, of forcing a legal skeptic to commit to a particular ethical position as a consequence of his metaphysics. Hence, the critical reading illustrates the fallacy of equating legal skepticism with nihilism.

A complete picture of law in society will include both a theory of the status of legal rules and a theory of the relation of those rules, and the practice of lawyers, to morality. While any legal ethics is logically independent of a descriptive picture of the world, ethics and metaphysics may be linked in emotional, thematic ways. A picture of the world as a raw, impersonal struggle may serve to rationalize an ethics grounded in self-love; a picture of the world as an intricate, interdependent web of relationships may serve to rationalize an ethics grounded in universal love. Thus, any particular legal metaphysical theory may, in fact, be linked by its proponents to legal ethics. For example, a metaphysical theory that conceived of laws as ideal objects might be linked with, and used to rationalize, an ethics that viewed obedience to the law as inherently good. On the other hand, a metaphysics that analogized laws to customs subject to change over time might be linked to an ethics which holds that there is no moral requirement to obey the law.

It also seems logically consistent to hold a theory in which laws are abstract ideals, but nevertheless not inherently good. For example, laws of

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30. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

science may be conceived of as abstract ideals, without obedience to the ideal carrying any moral import. (Indeed, obedience to a law of science is constrained by nature and is typically thought to have no moral weight whatsoever.) Equally, one could hold that laws, as society's customs, nevertheless morally compel obedience. For example, one might hold that we have a duty to respect other people and from that duty derive a duty to obey customs.

In one popular picture of the law, the law is complex. In difficult cases good answers may be hard to come by, but though resolutions of the cases are difficult, they are not arbitrary. Because the law is not arbitrary, lawyers, being honorable professionals, do not argue that the law stands for whatever their client wants. Instead, a lawyer will take a legally defensible position in an attempt to advance her client's legitimate interests. A lawyer will not take a legally impermissible position, not only because she is ethical, but also because she knows that an impermissible position will be recognized as such and will be rejected by her adversaries and the decision maker. This view might be called the establishment picture.

The other popular view might be called the skeptical picture. According to this view, lawyers are not constrained by professional honor, since the law is arbitrary. Lawyers are not constrained by the prudential boundaries of an objectively determinable law, since there is no objectively determinable law. Rather, the forces of the market, or perceptions of duty to the client, without opposition, impel the lawyer to maximize her profit by advocating her client's interests as zealously as possible, without regard to any independent conception of the meaning of the law she is interpreting. The lawyer may take this aggressive interpretive stance precisely because the law is just a relatively arbitrary social construct. The law is infinitely malleable and interpretable, thus the lawyer can bend it to her client's ends.

Idealist attacks on legal skeptics seem implicitly to treat these two rival pictures as if they are the only two possibilities. This essay referred above to the possible emotional or thematic link between metaphysical and ethical representations. The designation "emotional" or "thematic" may be taken to be dismissive, a way of saying there is really no content at all to the link, and partisans of the link are simply and inexplicably mistaken. We should not ignore the possibility that we should simply dismiss the idea of a link, but there are other possibilities as well. The kinds of theories a culture generates may reveal a great deal about what that culture values. Objectivity and determinacy may very well be "establishment" values. Practitioners of a profession, like the legal profession, that is a bulwark of the "establishment" of a society, will want both to justify and glorify their professional role by linking their profession to the objectivity that their culture values. In turn, the "establishment" will want to characterize its opponents as rejecting objectivity in metaphysics and in ethics.

The cultural analysis of views on the law/ethics connection remains delegitimating. The cultural analysis does not concern itself at all with whether there actually is such a link. We can also take the link view seriously and worry about whether it is true. Typically, an investigation of the possible link would follow a path from metaphysics to ethics, starting with a picture of the world and trying to conjure a picture of right action from that representation of the world. We should have little confidence that the view would have the force of logic, since we know of no way to deduce an "ought" from an "is." Nevertheless, the link may have the force of emotion or sympathy. The description of the world may impel us to feel that certain ways of acting in that kind of world must be given approbation, while other ways of acting must be treated with repugnance.

The persuasion need not go in the metaphysics to ethics direction, as the idealist attacks show. From a certain perspective, ethical knowledge is much clearer than metaphysical knowledge. Who knows precisely what a legal rule is? How can we argue the point? Yet who doubts that it is wrong to lie, cheat, and steal? As we have seen above, legal theorists often attack metaphysical views on moral grounds. If it were possible to form a chain from such ethical truth to metaphysical truth, legal metaphysics and ethics, and the link between them, could be firmly established.

V. AN ARGUMENT FROM ETHICS TO METAPHYSICS

One commentator, David Luban, has constructed a picture of the legal profession and justified that picture with an argument from ethics to metaphysics.[31] Luban's metaphysical project ultimately fails. Examining his argument illustrates why it appears impossible to use metaphysics to ground legal ethics on any basis other than sympathy and, conversely, why it appears impossible to use moral beliefs as a tool for attacking opposing metaphysical positions. Moreover, a close examination of Luban's project shows that there are indeed many possible pictures for legal theory to adopt, and that the simple establishment/anti-establishment dichotomy forced on one by belief in a metaphysics/ethics link does not accurately describe the universe of legal theories.

Luban's position is interesting and complex; he believes that the establishment picture should be correct, but his position has the following wrinkle: lawyers erroneously believe the anti-establishment picture.[32] Hence, while metaphysics and ethics are linked, actual behavior is not ethical, because people do not understand what the true metaphysics and ethics are. In Luban's idealist metaphysics, law is purposive and spirit-driven.[33] His legal ethic is founded on the values of community, solidar-

31. *Id.* at 18-20.

32. *Id.* at 18 (attributing this view to the critic who argues that instrumentalism is disrespectful of the law).

33. *Id.* at 18, 31.

ity, and respect for ones' fellows. The ethical lawyer takes responsibility for, and shares the ends of, her client.[34] While Luban's primary concern is ethics, he makes an excursion into metaphysics in pursuit of a complex argument intended to validate his communitarian ethical picture.

The strategy of Luban's argument straightforwardly exploits his implicit limitation of most discourse in legal theory to the establishment and anti-establishment pictures. First, Luban describes what he views as the dominant theory of legal ethics, an ethics based on what he calls the principle of partisanship.[35] This ethics is the anti-establishment ethics that the lawyer may do whatever her client wishes. He then claims that the principle of partisanship follows from what he describes as the dominant theory of legal metaphysics, legal realism.[36] Legal realism plays the role of the skeptical metaphysics in the anti-establishment picture. Luban seeks to identify and exploit the link between these metaphysical and ethical pictures. He attempts to demonstrate that the conclusions that follow from the principle of partisanship do not agree with the reader's judgments about right action.[37] Taking this repugnance to common morality to demonstrate that the principle of partisanship is false, Luban exploits the schema by arguing that legal realism is therefore also false.[38] Having established that legal realism is false, Luban poses his own idealist metaphysics as the only natural alternative.[39] Finally, Luban feels free to construct an ethical theory based on his idealist metaphysics.[40]

A close analysis of Luban's argument shows both how we can slip into a distorted picture of legal theory, by misdescribing theories to force them into one of the two pictures, and how the possibility of other pictures undermines any tight link one might attempt to forge between legal metaphysics and legal ethics.

A. *The General Argument Against Legal Realism and the Principle of Partisanship*

Luban characterizes the "principle of partisanship" as that "cynical" view of the law that holds, "[W]hen acting as an advocate, a lawyer

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34. *Id.* at xxii, 30.
35. *Id.* at 7, 11-18.
36. *Id.* at 18-19.
37. *Id.* at 21.
38. *Id.*
39. *See, e.g., id.* at 26.
40. While the argument against realism is a brief passage in Luban's book, it is significant because of its placement. *Id.* at 3-30. The arguments constitute the first two major arguments of the book in chapters 1 and 2. In chapter 3, Luban confronts a related ethical claim, the "ultrarealist" position that there is simply no obligation to obey the law. *Id.* at 30-49. In chapter 4 Luban introduces what he views as possibly the most important defense of the principle of partisanship, the complex of arguments that support the use of the adversary system (in which the principle of partisanship plays a crucial role). *Id.* at 50. This article is not concerned with Luban's discussions of the "ultrarealist" position or his discussion of the adversary system.

must, within the established constraints of professional behavior, maximize the likelihood that the client will prevail."[41] Luban calls the principle of partisanship disrespectful of the law, because the principle is supposed to lead to "instrumental" behavior that treats the law as an amoral tool to be used to satisfy the client's objectives, rather than behavior that treats the law as containing an ideal meaning.[42] According to Luban, there are two, equally bad, types of this instrumental behavior:[43] false formalism argues for the technical letter of the law in order to subvert its spirit;[44] false idealism argues that some particular picture or policy animates the law, to defeat the letter of the law.[45]

Luban contends that the two types of "instrumentalism" are only evils if we can find a true "spirit" and a true letter of the law.[46] By comparing "instrumentalist" actions with the "true" letter or "true" spirit of the law, we can then show that these behaviors are evil.[47] Luban believes that we can only speak of a true letter or spirit of the law from a "picture of law according to which its meaning, purpose, or 'spirit' is a given—univocal, rigid, self-explanatory, and uncontroversial."[48] Hence, Luban moves from an ethical judgment rejecting one part of the anti-establishment schema to a metaphysical judgment rejecting the other part. Luban identifies cynical disrespect for the law with "legal realism."[49] He describes legal realism as a picture of the law that treats law only "instrumentally," rather than treating law as having intrinsic meaning.[50]

Luban links legal realism with the principle of partisanship by appeal to the notion of respect. First, Luban identifies respect for the law as a principle value of the lawyer's role morality.[51] He criticizes the principle of partisanship as not displaying respect for the law.[52] Luban then contends that under legal realism, "only the law in action counts."[53] Next comes the crucial move, establishing the link between metaphysics and ethics. Under realism, Luban claims, if an official respects your actions, your actions exhibit respect for the law.[54] Luban concludes therefore that "if you believe realism, you will also believe that treating the law in-

41. *Id.* at 7, 11. Luban takes his formulation from Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978).
42. LUBAN, *supra* note 30, at 18.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 19.
50. *Id.*
51. *Id.* at 16 ("[O]ne must respect the law as it is given."); *see id.* at 30-49.
52. *Id.* at 16.
53. *Id.* at 19.
54. *Id.*

strumentally does not exhibit disrespect for it."[55] Realism thus "paves the way for a ready adherence to the principle of partisanship."[56]

From the principle of partisanship, Luban deduces ethical results that are repugnant to commonplace morality. He then argues that these results are incorrect only if skeptical metaphysics is false. In conclusion, Luban draws the moral that his suggested alternative, that the law is imbued with the ideal content of meaning, purpose, or spirit, is correct.[57]

B. *Idealism, Realism, Operationalism, and Determinacy*

Does viewing legal theory through the filter of the two pictures cause Luban to distort his description of the universe of legal theory discourse? To answer this question it may be helpful to revisit some general philosophical categories. As discussed above, schools of metaphysics may be divided into two camps, idealists and skeptics.[58] Idealists believe that there are entities—such as the meanings of words, moral rules, rules of mathematics, or laws of science—that are unlike ordinary physical objects. These entities are supposed to correspond to universal or abstract terms or concepts that the mind may apprehend directly.[59] Empiricist skeptics doubt the existence of ideal entities and seek to explain the nature of the meanings of words, moral rules, rules of mathematics, laws of science, and similar phenomena by reference to observable facts of the experienced world.[60]

American jurisprudence has been dominated by idealist theories (which can be fit into the establishment schema).[61] For an idealist, laws

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55. *Id.*

56. *Id.* at 19-20.

57. *See id.* at 26.

58. The terms used to describe these two schools are numerous and confusing. Idealists in the sense used in the text may also be referred to as realists, since they believe that ideal entities are real, while skeptics are sometimes called nominalists, because they believe that names are just names and do not correspond to ideal entities. Idealists may also be called rationalists, believing that we may know the world by knowing the ideal entities via reason, while skeptics may be called empiricists, since they believe that the world may be explained by reference to what we experience with our senses without recourse to ideal entities. There is a broader sense of idealism that is not used in the text. Idealism may refer to a philosophical school that holds that the world is nothing more than our ideas, while realists, in contrast, believe that the world is independent of our ideas and exists apart from our consciousness. The term legal realism refers to a nominalist or empiricist jurisprudence. The label "legal realism" places the legal realists in the context of the broader American philosophical movements of New Realism, *see, e.g.*, EDWIN B. HOLT, THE NEW REALISM (1913), and Critical Realism, its successor. *See, e.g.*, DRAKE ET AL., ESSAYS IN CRITICAL REALISM: A COOPERATIVE STUDY OF THE PROBLEM OF KNOWLEDGE (1920).

59. *See, e.g.*, Nicholas Rescher, *Idealism*, *in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 355-57 (Robert Audi ed., 1995).

60. *See, e.g.*, HUME, *supra* note 18, at 1-7.

61. *See, e.g.*, Norway Plains Co. v. Boston & Maine Ry., 67 Mass. 263, 267 (1854) ("[T]he common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it."); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 166-

reflect or partake of rules or meanings independent of, and logically prior to, the actual law passed by the legislature or created by the rulings of courts.[62] A modern idealist will usually believe that, although the bare formal rules of the actual or positive law may not go so far as to determine every case, the ideal rules of law do determine every case, thereby closing the gaps in the actual law.[63] By reference to the ideal rules of law, the legal practitioner may answer the hard cases where the positive rules of law do not readily give an answer.[64] For example, Hart and Sacks, proponents of the legal process school, believed that "[u]nderlying every rule and standard . . . is at the least a policy, and in most cases a principle. This principle or policy is always available to guide judgment . . . ."[65] By arguing for a purposive, spirit-driven picture of the law, Luban stamps himself an idealist, within the mainstream of American jurisprudence.

Legal realists are skeptics. They do not believe that there are ideal entities corresponding to legal rules. In Felix Cohen's phrase, the realists' description of law dispenses with idealism's "transcendental nonsense,"[66] and pays attention only to "a number of subordinate questions,

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67 (1958) ("Underlying every rule and standard, in other words, is at the least a policy and in most cases a principle. This principle or policy is always available to guide judgment in resolving uncertainties about the arrangement's meaning."); CHRISTOPHER C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS 2 (1879) ("Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility . . . constitutes a true lawyer . . . ."); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975) (stating that "judicial decisions in civil cases . . . characteristically are and should be generated by principle not policy"); Charles Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335, 336-37 (1980) ("The law is a moral science, and judges, in determining the law, decide as moral agents . . . [O]ne way to get a judge to make a particular decision is to make that decision the correct conclusion for a moral argument."); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 381 (1978) (adjudication, consisting of the case-by-case development or principle, is "a third area of rational discourse, not embraced by empirical fact or logical implication"); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 645 (1923) (stating that law consists of three elements: legal precepts, a body of traditional ideas as to how legal precepts should be interpreted, and "a body of philosophical, political, and ethical ideas as to the end of law . . . with reference to which legal precepts . . . are continually reshaped and given new content and application"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) ("[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.").

62. *See, e.g., supra* texts cited at note 61.

63. *See, e.g.*, Dworkin, *supra* note 61, at 1060.

64. *Id.*

65. HART & SACKS, *supra* note 61, at 166-67.

66. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). For example, Cohen wrote: "*Jurisprudence*, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics or psychology. In effect, it is a special branch of the science of transcendental nonsense." *Id.* at 821.

each of which refers to the actual behavior of courts."[67] For purposes of his argument, Luban characterizes legal realism as an operationalist jurisprudence that reduces the law to repeated procedures and outcomes consisting of courts considering cases and ruling to punish or not punish specific acts and actors. Luban takes the definitive statement of realism to be Oliver Wendell Holmes' maxim that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[68] In further support of his operationalist characterization, Luban cites the Felix Cohen maxim, set forth above, that law refers to "the actual behavior of courts"[69] and cites to Cohen and Karl Llewellyn's conclusion that the law is about predicting what officials do about disputes.[70] Luban thereby identifies legal realism with the operationalist theory that the law is nothing but the body of predictions of how the courts will behave in specific cases.

Schools of metaphysics may also be described as determinist or indeterminist.[71] This dichotomy seems logically independent of the idealist/skeptic divide. One can construct a formal logic that can be viewed as reflecting ideal logical concepts, and yet prove that the logic is incomplete, i.e., fails to determine for certain sentences whether the sentences are logical truths.[72] Hence the indeterminist logic corresponds (albeit not completely) to an ideal reality. On the other hand, a skeptic could believe that a system of mathematical postulates was complete, without believing that the postulates reflected anything more than rules for the manipulation of symbols. Legal idealists nevertheless tend to argue as if idealism and determinism were linked parts of the establishment schema. They rely on the existence of ideal legal objects to ensure that the law determines every case. Much of the tension in this debate is over determinism, not idealism proper.

Luban's emphasis on the operationalist aspect of legal realism is consistent with the failure to identify determinism as a separate major issue. Luban wishes to attack an indeterminist view of the law which

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67. LUBAN, *supra* note 30, at 20 (quoting Felix Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 16 (1937)).

68. *Id.* (quoting O.W. Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 461 (1897)).

69. *Id.* (quoting Felix Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 16 (1937)).

70. *Id.* (quoting Felix Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 16 (1937); K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 12 (1951)).

71. The Critical Legal Studies school has stressed the importance of the concept of indeterminacy in realist and critical thought. *See, e.g.*, Tushnet, *supra* note 1, at 1213 ("Realism showed that subjectivity and indeterminacy resulted when analysis was confined to traditional legal discourse."); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 360 (1979) ("For any given factual conflict of rights, the doctrinal structure will offer a choice of categorizations; the techniques of reasoning that are supposed to tell us which choice to make will themselves reproduce that choice at another level.").

72. *See* Kurt Gödel, *Über Formal Uunentscheidbare Sätz der Principia Mathematica und Verwandter Systeme I*, 38 MONATSHEFTE FÜR MATHEMATIK UND PHYSIK 173 (1931).

denies that the law can be "univocal . . . [and] self-explanatory."[73] Operationalism does not entail indeterminism. An operationalist can perfectly well believe that the observable, repeatable behaviors he uses to define law, such as the behavior of judges, exhibit predictable regularities. What he will not believe is that the regularities are explained and determined by ideal entities—such as principles or policies—floating above the plane of behavior. Fairly sophisticated attempts have been made to formulate operationalist theories of law. For example, Max Black offered an operational account of rules in which a rule has just two components: 1) a description of a class of actions and 2) an indication whether that class is required, forbidden, or allowed.[74] Alf Ross has shown how rules about the fictive ideal concept "tû-tû" can be reduced to rules about behavior.[75] Both these operationalist theories result in a picture of univocal rules yielding unique results.

It is not necessary to be an operationalist to deny law's univocal character. The positivist legal philosophy of H.L.A. Hart portrayed law as grounded in language, not in operations. Hart secured the partial regularity of law by a linguistic theory in which there are many core cases of meaning for legal rules—cases for which there is no difficulty in determining what the law is in practice.[76] Yet in extraordinary cases where, according to his theory, the meaning of the law gave out, Hart would differ from a determinist and describe the judge's role as legislating among unforced alternatives.[77]

The heirs to Legal Realism, theorists of the Critical Legal Studies movement, are not operationalists. Instead, at least some of them seem to believe that law has a large scale ideal structure. In contrast to the idealists, practitioners of Critical Legal Studies believe the ideal structure is never univocal. The hallmark of Critical Legal Studies is the slogan that for every principle there is a counter-principle, for every policy a counter-policy, for every rule a counter-rule.[78]

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73. LUBAN, *supra* note 30, at 18.

74. Max Black, *Notes on the Meaning of 'Rule,'* 24 THEORIA 107, 119 (1958), *reprinted in The Analysis of Rules, in* MODELS AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY 95, 107-08 (1962).

75. Alf Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957).

76. *See, e.g.*, H.L.A. Hart, *supra* note 5, at 607.

77. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 132 (1961) ("The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.").

78. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) (describing the transformation of contract law from the dominant equitable theory to the dominant will theory); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000 (1985) (discussing "doctrinal structures that depend on the dualities of public and private, objective and subjective, form and substance"); Kennedy, *supra* note 71, at 355 ("The conflict of rights occurs at every level of the legal system, at least as liberalism conceives the system.").

In sum, it is not the operationalism of legal realism that forces it to deny law's univocal character, but rather legal realism's emphasis that extra-legal considerations, such as politics, psychology, and social class, determine the judge's actions.

The proper target for Luban's attack is that strain of jurisprudence that unites realists and critics: the denial of law's univocal character and the assertion of its fundamental indeterminacy. The realist and the critic both agree that law cannot be predicted from some ideal structure—the realist because he denies the existence of an ideal structure, the critic because he denies its efficacy. Thus, when Luban takes realism as defined by Oliver Wendell Holmes' slogan, "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"[79] as his enemy, he fails to directly attack Critical Legal Studies, the only current academic school of jurisprudence that might trouble him. On the other hand, the target of Luban's argument does end up being indeterminist theory. As will be seen below, the "nothing more pretentious" clause of Holmes' slogan, which denies idealism altogether, plays no role in Luban's argument. Only the denial that idealism can determine an answer is attacked. Thus, Luban's arguments, if successful, will weigh as heavily against the idealist Critical Legal Studies as against legal realism.

C. *The Dominant Metaphysics and Its Relation to Ethics*

To make the connection between metaphysics and ethics relevant, Luban must argue that realist metaphysics actually influences lawyers' behavior. Luban characterizes legal realism as the "dominant school of jurisprudence in twentieth-century America."[80] His thesis is gravely undermined by the observation that legal realism is far from the dominant strain of twentieth century jurisprudence. Although realism rose in popularity, as a reaction against formalist idealism in the twenties and thirties, idealism made a vigorous comeback in the fifties and sixties with the Legal Process and Neutral Principles schools,[81] the liberal jurisprudence of thinkers like Ronald Dworkin,[82] and the emergence of the law and economics school.[83] Although realist-style indeterminacy arguments

79. LUBAN, *supra* note 30, at 20 (quoting O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897)).

80. *Id.* at 19. Luban's pursuit of this argument apparently began with a commentary on an article by Stephen L. Pepper. *Id.* at 20 n.16. Pepper introduced the mischaracterization of legal realism as the dominant school. Stephen L. Pepper, *The Lawyer's Amoral Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 624 (1986). Luban adopted it without further analysis. David L. Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 646 (1986).

81. *See, e.g.*, HART & SACKS, *supra* note 61 (explaining legal process); Wechsler, *supra* note 61 (explaining neutral principles).

82. *See, e.g.*, Dworkin, *supra* note 61.

83. *See, e.g.*, DWORKIN, *supra* note 15, at 276-80; Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229, 2260 (1996).

have been revived in the last twenty years with the skeptical analyses of Critical Legal Studies, that school is far from achieving academic dominance.[84]

If determinist idealism, rather than legal realism, is the dominant academic legal metaphysics, Luban's attempt to explain the current professional-role morality by reference to metaphysics is refuted, because he cannot establish a causal link between the two. Luban has an implicit reply to this criticism. He argues that although realism is not taught as the favored doctrine in jurisprudence classes, it is taught, implicitly, in every single substantive legal class.[85] Students are continually called upon to distinguish and analogize cases and to argue for whatever position is assigned. While professors claim to believe the law is determinate, they actually teach that it is indeterminate.[86] Thus, the message of legal instruction may always be a closet realism. The teaching demonstrates that the law is indeterminate and infinitely manipulable. Idealism is honored, but realism is taught.[87] If closet realism is taught, Luban may maintain his thesis.

There are at least five possible explanations for the seeming paradox that idealism is officially honored while legal theory manipulation is taught. Closet realism is only one of them. A second explanation relies on our adversary system of justice and a redescription of what is taught in law school. The idealist professor could object that the closet realist account is just a misunderstanding of legal education. What is really taught is idealist theory building. The student starts out with a toolbox of cases, rules, and policies and a position to support. She then builds a legal theory which provides a principle or policy to explain the cases and support her position. In short, the student learns legal argument.[88] The student is allowed to use it for her client because of the belief that our adversary system requires all lawyers to use the law instrumentally for

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84. *See, e.g.*, Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 579 (1983) (contrasting Critical Legal Studies with the "dominant styles of legal doctrine" which feature, *inter alia*, "ideal purposes, policies, and principles" lending them "a semblance of authority, necessity, and determinacy").

85. *See* LUBAN, *supra* note 30, at 18-19.

86. A variant of this explanation would be that while academic jurisprudists profess that law is a determinate, idealist system, most practicing teachers simply do not think about jurisprudence at all. They naturally end up treating the law as if the most minimal jurisprudence, legal realism, were true. In this variant, there is an institutional hypocrisy resulting from a split between the academics who think about the nature of the law and the academics who teach lawyers how to use the law.

87. *See* Unger, *supra* note 84, at 674-75 (describing most contemporary jurists as regarding with disdain idealists who strive to recreate "objectivism and formalism"). The majority of jurists "abased [philosophy] into an inexhaustible compendium of excuses for the truncation of legal analysis. The social sciences they perverted into the source of argumentative ploys with which to give arbitrary though stylized policy discussions the blessing of a specious authority." *Id.* at 675.

88. *See* DWORKIN, *supra* note 15, at 87-89 (explaining what Dworkin calls, in his later writings, interpretation).

their client.[89] The client himself cannot argue, because he does not know enough law. The other side will also have a lawyer, who will present its best legal theory. An impartial judge will pick the best argument. We could not be sure, the argument goes, of finding the best legal theory, unless both sides were as ably argued for as possible.

The legal theory toolbox explanation does not account for the possibility that one person can determine the law without going through the arbitrated dialectic. If we acknowledge the possibility of determining the law by one's self, how do we explain why a lawyer should not first try to find the truth independent of the judge, and if successful, conform her client's position accordingly? We can call the legal theory toolbox explanation procedural skepticism; the theory that the determinate, univocal nature of the law does not have confining ethical consequences, because that nature is unknowable until the end of the adversary process. If procedural skepticism explains how legal education works, Luban's attack on metaphysics will miss the real target.

A third explanation is hypocrisy. A lawyer may believe idealism is true and know that, in fact, a good argument for the wrong side more often obscures the truth than reveals it. But a lawyer has a skill and needs money. So lawyers legitimize the use of their skill by appealing to the adversary system. The hypocrisy explanation undermines the connection Luban wants to make between metaphysics and ethics at a more basic level. If hypocrisy is the explanation for people's behavior, people are ignoring what they know to be good and right for improper reasons. If people are just bad, it does not matter whether they can appeal to metaphysics to justify their behavior.

A fourth explanation might be called legal descriptivism. Under this theory, law is determinate in virtue of its meaning, but that fact is morally indifferent. While it may be crystal clear that driving faster than the speed limit is illegal, no moral significance whatsoever is attached to this fact. Since there is no disapprobation to be attached to subverting the law, the lawyer is free to help his client do so. This theory is particularly plausible in connection with laws and regulations, such as the tax code, divorced from the traditional morality of most common law torts and crimes, which are regarded as intrinsically evil.[90]

A fifth explanation may be nonuniversalist ethics. If a lawyer believes in a universalist ethics where moral obligations to everyone re-

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89. LUBAN, *supra* note 30, at 50-103 (calling this the "adversary excuse" and discussing it at length).

90. *See, e.g.*, Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784, 788 (1989); Richard L. Gray, Note, *Eliminating the (Absurd) Distinction Between Malum in Se and Malum Prohibitum Crimes*, 73 WASH. U. L.Q. 1369, 1374-78 (1995) (giving history of the distinction between malum in se and malum prohibitum crimes).

ceive equal weight, then the lawyer has difficulty in justifying privileging the ends of the client over the ends of the adversary. On the other hand, if the lawyer believes in a kind of local communitarian ethics in which one has tighter obligations to those closer to one than to strangers, the adversary system is easy to justify. The lawyer may believe that duties to those closest to her override any moral imperative that the law prescribes concerning strangers. She is her client's friend and as such owe a greater duty to him.[91]

In other words, even with a legal theory that endorses an establishment metaphysics and ethics, there are numerous ways that metaphysics and ethics could relate to the actual behavior of lawyers. The straightforward scenario in which lawyers conform their behavior to the true ethical theory is only one scenario among many candidates from which to choose. Only if the practice of law is dominated by closet realism will Luban's argument against instrumentalism be of much force in changing lawyers' behavior. Given the multiplicity of equally plausible explanations for belief in the adversary principle, even if Luban's argument does refute closet realism, the more practically important underpinnings of the principle of partisanship survive unscathed.

D. *The Attack on Realism*

Luban offers two arguments intended to show that legal realism is false and a third argument intended to show that even a legal realism modified enough to contain some element of determinism cannot justify the principle of partisanship.

1. Argument 1: The Refutation of Realism

Luban's sketches his first "refutation" of realism as follows:[92]

> 1) "The prophecies of what the courts will do in fact, and nothing more pretentious, are what [is meant] by the law;"[93]
>
> therefore
>
> 2) No act is illegal if the courts can be induced to go along with it;[94]
>
> therefore
>
> 3) The law is what the judge says it is;[95]

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91. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066, 1071 (1976).

92. LUBAN, *supra* note 30, at 20-21.

93. *Id.* at 20 ("The thesis of legal realism was stated authoritatively by Holmes thus.").

94. *Id.* at 21 ("[N]othing whatsoever is illegal if you are able to get officials to go along with you.").

95. *Id.*

therefore

4) Anything a lawyer does in pursuit of the client's interests is respectful of the law if it works.[96]

Proposition 4 is taken to be a *reductio ad absurdum* of realism. If the argument works, it refutes a metaphysical theory based on an ethical consequence of that theory.

a. *Linking Proposition 1 to Proposition 2*

Proposition 1 is simply a restatement of Holmes' realist slogan. Does proposition 2 follow from proposition 1? As the argument is sketched, it does not. The sketch is an enthymeme—we must add premises that articulate a relation between the propositions. One plausible premise is

1.1) If an act is illegal, then it is prohibited by the law.

1.1 entails

1.2) No act is illegal if it is not the case that it is prohibited by the law.

By substitution from 1 we can now deduce

1.3) No act is illegal if it is not the case that it is prohibited by the prophecies of what the courts will do in fact.

1.3 is still not quite proposition 2. To get from 1.3 to proposition 2, we must add a premise connecting the action of inducing a court to go along with something and the prophecy that the court will go along with it. To make the link, we can add a premise which gives content to the idea of being prohibited by a prophecy of what the courts will do. (This is an awkward formulation, since it is natural to speak of a law as prescriptive, whereas a prophecy is thought of as descriptive. Nonetheless, no problem seems to stem from this awkwardness.)

1.4) An act is prohibited by a prophecy of what the courts will do in fact if and only if the prophecy predicts that the courts will punish the act.

By substitution into 1.3, this yields:

1.5) No act is illegal if it is not the case that the prophecy of what the courts will do in fact predicts that the courts will punish the act.

We may take the "prophecy" of Holmes' slogan to be a prediction which is true.[97] Hence, the slogan tells us that a body of law is the body of

96. *Id.* ("[F]or the realist, anything you do in pursuit of your client's interests is automatically respectful of the law if it works.").

the accurate predictions of the behavior of the courts. It also tells us, in the "nothing more pretentious" clause, that Holmes regards any metaphysical ideal content added to those predictions—content such as natural law, or principles and policies which guide the law—as empty nonsense. Nevertheless, the rejection of ideal content does not entail the loss of the ability to compare the action of the courts with what is predicted. There are three possibilities when a prediction is requested about what the courts will do: 1) a true prediction is made about the courts' action; 2) a false prediction is made; and 3) no prediction can be made. Only in case 1 is there a prophecy. Hence, applying premise 1.5, we can see that by this realist definition of the law, an act may be illegal only in case 1.

For example, we may predict that the courts will punish an act, but then find that the courts do not. We may be mistaken because we are surprised about the court's interpretation of the law, the court's interpretation of the evidence, or some other factor, such as the court's susceptibility to some sort of extra-legal pressure, such as bribery. Since a prophecy is a true prediction, there was no prophecy, although we thought there was. Going strictly by the slogan, we must say that the law, or at least the legal/illegal dichotomy, failed to cover the act. Alternatively, we may not be able to prophecy from knowledge of the law whether the courts will hold an act legal or illegal. Perhaps the law is unclear (such as in a case of first impression), perhaps the facts are unclear, or perhaps the susceptibility of the courts to extra-legal pressure is unclear. Since there is no prophecy, the slogan tells us that the act is not covered by the law.

We now see that we can describe three cases where the courts can be induced to go along with an act: 1) the case where the court's action can be prophesied; 2) the case where the court's action is wrongly predicted; and 3) the case where no prediction can be made. These cases support the following proposition:

> 1.6) If the courts can be induced to go along with an act, then it is not the case that the prophecy of what the courts will do in fact predicts that the courts will punish the act.

By transitivity from propositions 1.5 and 1.6, we can finally derive proposition 2:

> 2) No act is illegal if the courts can be induced to go along with it.

b. *Linking Proposition 2 to Proposition 3*

Proposition 3 states that:

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97. Again, this definition is loose. Presumably a prediction which is true at random, or for the wrong reason, should not count as a prophecy. It should also be understood that on a realist account, whatever is that property which makes a true prediction into a prophecy, it is not a metaphysical property such as having a relation to a principle or a policy. Nonetheless, the truth of the prediction is at least a necessary condition of being a prophecy.

3) The law is what the judge says it is.

Strictly speaking, proposition 3 is in the wrong tense, because the emphasis of the realist definition of law that we have been considering is on prophecy. Accordingly, proposition 3 should be modified as follows:

3.1) The law is what the judge will say it is.

As is shown above, there are three possibilities for the relation between the law and an act. In only one of those cases, the case where we can truly predict what the judge will say, is 3.1 true. Hence, proposition 3.1 does not follow from proposition 2. Modifying again, we obtain:

3.2) If we can truly predict what the judge will say, the law is what the judge will say it is.

In his sketch of this argument, Luban criticizes proposition 3 by appealing to our unreflective moral views of its consequences.[98] These criticisms do not hold up against the weaker proposition 3.2 that is actually derivable from the argument. Luban imagines the court may be induced by bribery or threats to decide in favor of some party, even though that party has committed a plainly "illegal" act.[99] He believes that in this situation the legal realist is compelled to say, contrary to hypothesis, that the act was legal.

For the act to be plainly illegal, according to the legal realist definition of illegality given by Luban, there must be something that would allow one to predict, all else being equal, that the courts would punish the act. We can imagine three cases in which bribery protects an actor from punishment, using the three possible relations between a law and an act. In case 1, the legal realist sees the act and the law, and prophesies that the court will hold the actor liable. In case 2, the legal realist prophesies that the court will not hold the actor liable. In case 3, the legal realist would not be able to prophesy.

In case 1, the legal realist's prediction is undone by the court's corruption. Going by the legal realist slogan, here we must say that the law failed to cover the act.[100] This description does not seem repugnant. Corruption derailed the law and prevented it from applying here. The idealist would disagree, saying that the law did cover the act, but was not administered by the courts. There is a difference of emphasis in the descriptions—the realist paying more attention to what happens in the world, the idealist caring more about text and intentions. This different

98. LUBAN, *supra* note 30, at 21.

99. *Id.*

100. Holmes' slogan distinguishes his brand of legal realism from the operationalism of Black and Ross, or Hart's positivism. *See* Black, *supra* note 74, at 107-08; Hart, *supra* note 5; Ross, *supra* note 75. Those scholars could choose to say that the language of the law picked out a class of actions, such that the law did cover those actions. It is intelligible for them to say that the court's corruption undermined the clear meaning of the law.

emphasis should not offend unreflective moral opinion; hence, it does not refute the realist. The realist is not forced to say that whatever act the court fails to punish is legal.

In case 2, we can imagine that the legal realist knows the law and the act committed, and knows that if the courts operated impervious to offers of bribery, they would punish the act. Nevertheless, the realist also knows the operation of these courts, and knows that the defendant will bribe the judge and get off. Only in this case is the realist forced by his slogan to Luban's suggested conclusion that the act is legal.

In case 3, the realist is unable to prophesy. We can imagine that this is a world in which some judges are corrupt, and some are not, and it is impossible to tell who is what. Thus, neither the realist nor the actor knows, when the act is committed, whether a court will punish the act. The realist will have to say the law does not cover the act. Again the appraisal seems inoffensive. In case 3, no act is categorically forbidden. What happens in any particular case depends completely on what kind of judge one is assigned. The idealist might say that the act is illegal, but one can never tell whether the judge will be corrupt. This idealist formulation fails to stress the law's failure here. If one can *never* predict the way the law will be applied, there is in a sense no law-like regularity. In any case, the difference of emphasis in case 3 does not refute the realist either.

For case 2, the only case rendering the first clause of proposition 3.2 true, we can now examine if proposition 3 is repugnant. Proposition 3 states that the law is what the judge says it is.[101] Let us suppose that the act in question is murder, and the judge is bribed to direct a verdict, saying there is not enough evidence for the prosecution to prove its case. Again, there are three possibilities. Considered absent the bribery, either there clearly was a winning prosecution case, there clearly was not a winning prosecution case, or it is not clear whose case wins. If there clearly was not a winning prosecution case, the judge made the right decision, though for the wrong reason. In the other two cases, the judge may be making the wrong decision. Luban would want to say that when the court makes the wrong decision it has "said" that murder was legal. Luban would argue, therefore, that proposition 3 is false, since murder is illegal.

The attempt to suggest that proposition 3 is false moves too fast. On closer examination, we can see that this attempt reveals a general flaw in

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101. LUBAN, *supra* note 30, at 20-21. Strictly speaking, this formulation is a betrayal of realist principles. It would be more accurate to say that "the law is what the judge orders." It is a familiar phenomenon that an opinion will give lip service to some legal principle and then, by categorizing facts in an extreme manner, vitiate that principle in practice. For example, the judge might say that consideration is necessary to enforce a contract, and then grant relief where consideration is merely nominal or on a promissory estoppel theory.

appealing to unreflective moral opinion. In looking at these examples, we are implicitly dealing with six categories: legal, moral, this world, the world of the hypothetical case, description, and prescription. We may take it as true that murder is illegal in this world and that murder is immoral in both this world and the world in case 3. By hypothesis, murder is legal in case 2, according to the description of realist jurisprudence. Realist jurisprudence is silent, however, on the question of the morality of murder and on the question whether murder ought to be legal in the world in case 2. It is only by the covert conflation of the categories of morality and illegality, and of description and prescription, that we can generate an unreflective moral opinion that the realist description of murder as legal in case 2 is repugnant (based on the unarticulated and false view that the realist is in favor of murder in this world).[102]

In short, case 2 is again indicative of the realist emphasis on the world rather than on intentions. If we actually imagine a world in which anyone with enough money to bribe a judge can commit otherwise 'illegal acts', and everyone knows it, there is a certain truth to be gained by refusing to call those acts illegal in this system. For example, it is a familiar charge that there is a different law in this country for the rich and powerful than for the poor and powerless. If one holds this view, one gains descriptive and rhetorical force by saying that it is not illegal in this country for a rich man to kill his wife, but only for a poor man to do so. On the other hand, in the face of the realization that the courts will not punish this act, there is something hypocritical about nevertheless asserting that the act is illegal in our system. Again, the emphasis is different. The realist will say: This act is legal in this jurisdiction, because it is not subject to any punishment. The idealist will say: This act is illegal in this jurisdiction even though it is never subject to punishment. There does not seem to be anything universally repugnant to unreflective moral opinion in the realist description.

c. *Linking Proposition 3 to Proposition 4*

Having qualified the scope of proposition 3 and assessed its implications, we now come to proposition 4: Anything a lawyer does in pursuit of the client's interests is respectful of the law if it works.[103] Respect is a notion that is foreign to the system of propositions we have been working out. Hence, nothing in the realist theory explicitly says one way or another whether one should respect the law, as Luban believes, or whether an action may be interpreted as respecting or disrespecting the law. The notion of respect refers to the value we place on an institution. The addition of a proposition concerning respect marks the explicit introduction of an evaluative or moral term to Luban's discussion.

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102. Luban may, of course, wish to deny the descriptive/prescriptive distinction made by the legal positivist, but he gives us no reason to go along with him.

103. LUBAN, *supra* note 30, at 21.

There does seem to be an implicit argument from proposition 3 to proposition 4. We might reconstruct the argument by adding a definitional premise about respect:[104]

> 4.1) If a lawyer's act aids the judge in deciding the case in accord with the law, it respects the law.

Since by 3, whatever the judge says is the law, if 4.1 is true, then 4 must be true. If what the lawyer does works, it aids the judge in the decision, which was the law. Nevertheless, since proposition 4.1 defines respect in terms of results according with the law, rather than defining respect in terms of conduct or process, proposition 4.1 cannot be advanced by the idealist. As we have mentioned, it may well happen that despite the bribe, the defendant really did deserve a directed verdict. Hence, by an idealist criterion, the lawyer's bribe aided the court in getting this correct result. By 4.1, the idealist should therefore conclude that the lawyer's bribe respected the law. But this is precisely what Luban is arguing against. Therefore Luban must agree that 4.1 is false.

Alternatively, Luban may try to derive proposition 4 through the use of some intermediate definitional criterion that links respect of the law with legal procedures. Nevertheless, since disrespectful conduct may still be legal, and since, in the example of bribery, the disrespectful conduct is by stipulation accepted by the court, the definition cannot appeal to what legal procedures the court will accept.

If Luban does not define respect in terms of what acts the court will accept, he eliminates the link between "respect" and legal realism's criterion for law. For example, suppose the definition included a list of activities that might be undertaken, consistent with respect for the law, to help the client. All other activities would be disrespectful. Bribery would, of course, be omitted from the list and hence be disrespectful. Since this definition has as a consequence that bribery is disrespectful of the law, it could not be used to imply the result that bribery was respectful. Since this definition implies nothing about whether the court accepts bribery, it cannot be inconsistent with the realist definition of law.

In short, in constructing a proposition 4.1 that can be used to deduce proposition 4, Luban must be careful that the proposition is not so broad that it implies that an idealist might say, depending on the example, that bribery respected the law. In addition, he must be careful that the proposition is not so narrow that it would force a realist to say that the bribery in this example was disrespectful. Unfortunately, Luban cannot escape this dilemma. Since respect is not a term of the realist theory, Luban must define respect independently of that theory. If he gives a definition of respect which refers to legal results, and thereby makes the necessary

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104. *See id.*

link between the definition of respect and the realist criterion of law, an example can be found that makes the definition of respect repugnant to an idealist theory. On the other hand, if he gives an example based on process, one which will be consistent with idealist theory, the definition will have no point of intersection with the results-oriented formulation of legal realism. The definition, therefore, will allow the realist to agree with the idealist that acts like bribery are always disrespectful, regardless of the court's response to those acts.

2. Argument 2: Introducing Value Terms to Realism

Luban does not acknowledge the idealist's inability to come up with a suitable definition for "respect" to use as a club against the realist. Instead Luban declares victory for his argument[105] and forges on, trying to "fix" realism so that the "damaging" argument from respect for the law cannot affect it. He does so by attempting to modify proposition 3. In place of proposition 3, he substitutes:

> 3') "[The] law is what the judge says it is except when she is illegally influenced."[106]

This proposition is incompatible with realism, since it is a denial of the simple Holmesian realism Luban has been attacking. Nevertheless, Luban may feel it is an appropriate suggestion, because the proposition does not add any new entities to the law, but still relies on seemingly operationalist definitions of the law—descriptions of the court's behavior. The new criterion is illegal influence, a natural choice, because we suppose that the judge has been influenced by bribery. Luban argues that this modified definition of law is circular, because it uses the concept of illegal influence, yet the judge herself is the person that says whether the influence is illegal.

In fact, the definition need not be circular on a sufficiently complicated model of the legal system. Up to this point, we have been using a simple model in which we implicitly imagined that there was only one judge and one court. This model has worked fine with all prior examples, but the new proposition 3' shows an important discrepancy between this model and a more complex model. If we imagine a model more like the real world, in which there are multiple courts with the capacity to check each other's conduct, then we can give operational content to the concept of illegal influence beyond reference to the behavior of any single judge. For example, we could rephrase proposition 3' as:

> 3'.1) The prophesies of what the *courts* will do in fact are what the judge says they are except when the judge is influenced by an act that the prophesies of what the courts will do in fact would prohibit.

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105. *Id.*
106. *Id.*

Proposition 3'.1 is an operational definition that maps the way our courts now deal with illegal influence. Illegal influence is identified by getting another court to assess the suspect judge's behavior.

Hence, Luban's objection is not as powerful as it at first seems. The definition of law can be made on a more sophisticated model to refer to the courts, not the individual judge. In such a model, the opinion of one judge only does not make the law. It is the final opinion of the system that counts. The realist construction of "illegal influence" would concern whether we could prophesy that the judge before whom the charge of illegality was presented would punish the act. While Luban's suggestion points out a problem with the model, the problem is not with the realist aspect of the model, but rather that the model only contains one judge. In sum, the realist account of "illegal influence" may be sufficiently robust to avoid Luban's charge of circularity.

Nonetheless, since Luban takes 3' to be refuted by the circularity objection, he suggests another criterion:

> 3") "[The] law is what the judge says it is when she is interpreting it in good faith."[107]

The new criterion introduces the evaluative notion of good faith. The criterion is not as apparently circular as the appeal to legality, but Luban nevertheless finds a circularity problem. According to Luban, 3" is ultimately vacuous, because a judge interpreting the law in good faith must, according to the realist, use the realist definition of law. Thus the judge must sit down and try to prophesy what she will do. This activity can lead nowhere.[108]

In this argument Luban makes a crucial category mistake[109] which leads to a leap of logic in his analysis of the good faith definition of law. Realism is a metaphysics of the law, a theory of what sort of ideal, ontological, or logical status rules of law have. Law itself is a separate thing, the item studied, not the activity of studying. Similarly, biology is the study of living things, but living things are not a science or a study, they are entities (capable of) existing and behaving independent of anyone studying them. There is no reason to suppose that the judge described in legal realist theory must herself believe that theory. Luban conflates the realist study of law with the object of that study, the judge and the judicial system. The realist definition of law says nothing about the metaphysical views of actual judges. The realist would take his definition of law to apply equally well to any legal system, even one staffed by idealists.

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107. *Id.*
108. *Id.* at 22-23.
109. *See* GILBERT RYLE, THE CONCEPT OF MIND 16-18 (1949).

Secondly, even were the judge a realist, it does not follow that her good faith deliberation would be an empty attempt to predict her own behavior. Such a claim confuses a metaphysics of law with a decision procedure for individual cases, two quite different things.[110] For example, the definition of automobile might be "four wheeled vehicle propelled by an internal combustion engine." That definition is definitely not an algorithm for constructing a car, and would aid one very little in a good faith effort to do so. On the other hand, a detailed instruction book on how to make an individual car would not constitute a definition of the automobile. (There are many different kinds of cars which are made in many different ways. A specification for building a Formula One race car would not cover a Volvo station wagon, but both are covered under any satisfactory definition of car.) In short, the realist judge would be free to engage in whatever decision procedure she deemed appropriate.[111]

At this point Luban would say that if you allow the judge a decision procedure—reasoning—then you are admitting, after all, that the law has an ideal structure accessible through reason. That is, what the judge is doing is reasoning about the law, and the result of her reasoning is the discovery of the law. Moreover, in order to prophesy what the judge will do, one need only anticipate the judge's reasoning. Realism appears to be stood on its head—prophecy drops out as an empty notion to be replaced by the ideal reasoning the realist had rejected as pretentious.[112]

The argument moves too fast. Several things must be true for this idealist reduction of realism to work. First, it must be the case that all or most judges reason according to the idealist theory. In that case, and in that case only, the realist lawyer, in prophesying the judge's opinion, would merely reason out the law on his own, according to the correct theory. If, on the other hand, there were many different judges believing in many different theories, the lawyer would want to know which particular theory each individual judge holds. The lawyer would have to do more than reason according to the one true theory; therefore, the realist prophecy of the law would diverge from any one idealist view.

Second, reasoning according to some idealist theory of the law must actually constitute a univocal decision procedure in real cases. Luban appeals to the reasoning outlined in the judicial opinion as in fact being that decision procedure. The realist would emphatically deny Luban's claim, arguing that all legal theories are hopelessly indeterminate and cannot be used to arrive at a unique answer for each case. The reasoning

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110. *See, e.g.*, Cohen, *supra* note 66, at 845-46 (discussing forces that might drive judicial decisions, including economic forces, aesthetic ideals, and political bias).

111. *See, e.g.*, Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 376 (1983) (recommending that the lawyer bring out the true socioeconomic and political foundations of legal disputes); Unger, *supra* note 84, at 667-68.

112. LUBAN, *supra* note 30, at 24.

in the opinion may serve to legitimate the judge's decision, but cannot have necessitated it. So even if all judges did happen to hold the same theory, the realist would argue that the theory did not completely determine the judges' decisions, and that there was something more to prophesy than mere theory-as-decision-procedure manipulation.

There are at least two ways indeterminacy can leak into a theory. One is on the formal level. A determinist theory must have rules tight enough to entail a unique answer for any case that can be posed to it. The second—on the practical level—is the application of the theory to facts. A determinist theory must be grounded in a sufficiently comprehensive practice under the theory so that any set of facts can be resolved into a unique theoretical description. Luban demands that the law be "univocal, rigid, self-explanatory, and uncontroversial,"[113] just to avoid these two kinds of indeterminacy, but it is hard to see how the law can be made "univocal, rigid, self-explanatory, and uncontroversial."[114] Formal indeterminacy is simply a condition with which all systems of knowledge must contend. Completeness and consistency are the two paramount criteria of determinacy for formal systems.[115] A formal system is incomplete if the formal system is not powerful enough to account for all the facts in the domain of the theory.[116] It is inconsistent if its decision procedure decides some cases in two contradictory ways.[117] No formalization of arithmetic is both complete and consistent.[118] If formalizations of arithm-

113. *Id.* at 18.

114. *Id.*

115. These criteria derive from what is known as Hilbert's Program, an effort to provide a foundation for mathematics in logic. *See* Wilfrid Sieg, *Consistency, in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 59, at 155; Mary Tiles, *Philosophy of Mathematics, in* THE BLACKWELL COMPANION TO PHILOSOPHY 325, 346-47 (Nicholas Bunnin & E.P. Tsui-James eds., 1996).

116. More precisely, a formal system is deductively complete when, for every set of sentences, every logical consequence of that set of sentences is derivable from that set of sentences using the formal system. *See* George F. Schumm, *Completeness, in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 59, at 141. We may regard a legal theory as having two parts, a description of what counts as legal decision making and a set of sentences setting forth the law. In a formally complete legal theory, every legal consequence from a set of sentences describing a state of affairs should be derivable from the legal decision making process described in the theory plus the sentences in the theory setting forth the law.

117. *See* Sieg, *supra* note 115. More precisely, a set of statements is consistent relative to a formal system if one cannot derive a contradiction from the set of sentences using the formal system. A legal theory itself will be inconsistent if a contradiction is derivable, using the legal decision making process set forth by the theory, from nothing more than the set of sentences in the theory that set forth the law.

118. *See* Godel, *supra* note 72. The incompleteness of any formalized system of arithmetic arises from the impossibility of stating a formalization of arithmetic that avoids self-reference. *See* Tiles, *supra* note 115, at 347-48. It is possible to formalize simple systems, such as the classical logic of sentences or the classical logic of sentences and predicates, without self-reference. *See* Sieg, *supra* note 115, at 155. These systems are complete and consistent. A theory of law that contained within itself meta-legal propositions such as "Whenever the positive law gives out, the judge should refer to principles," and "In every case where the judge is referring to principles and the principles seem to conflict, the judge should assign the principles different weights and follow the weightier

etic are indeterminate, it seems highly unlikely that the much vaguer field of law is formally determinate. Moreover, once we realize that even as rigorous a field as arithmetic is indeterminate, we can see that we need not take the charge of indeterminacy as an invidious criticism of the law, but simply as a recognition of the nature of some complicated systems.

Factual indeterminacy is a phenomenon with which all practitioners are familiar. No matter how much detail is written into a law, it cannot contain within itself its own interpretation.[119] At some stage, some practitioner, whether a lawyer or a judge, must look at the law and at a fact pattern, and make the decision as to whether the fact pattern falls under the terms of the law. The law may contain vague "fudge" words like "reasonable" that invite argument over meaning, or more precise words like "pipe" that seemingly leave little room for dispute. No matter, a case will always come up that does not quite fit accepted usage—the hard case for the legal positivist.[120] In these cases the (existing positive) law does not determine how it is to be applied to the facts.

Even if one grants, like H.L.A. Hart, that there are easy cases completely determined by the theory, it still does not follow that the judge's decisional procedure would be the best prophecy procedure. David Shapiro's article on Justice Rehnquist's jurisprudence eloquently makes this point.[121] Although Rehnquist's opinions will contain the appropriate doctrinal argument about federalism, equal protection, and so forth, Shapiro was able to formulate a more concise realist description of the law in Rehnquist's hands. For example, Shapiro predicts that Rehnquist's holdings would follow the rule: "Conflicts between an individual and the government should, whenever possible, be resolved against the individual."[122] Even if Rehnquist actually thinks through his legitimating doctrine before issuing a decision, that doctrine drops out of the realist calculus.

In his more recent writings, Ronald Dworkin has attempted to solve the problem of indeterminacy by invoking the theory, discussed above in connection with the fact/value distinction, that language is best described as consisting of practices and institutions.[123] Dworkin hopes to exploit the

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principle," would seem to have enough complexity that either inconsistency or incompleteness would be difficult to avoid.

119. *See, e.g.*, WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 23, §§ 143-149, 222, at 56-69, 86.

120. *See* HART, *supra* note 77, at 135.

121. David Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

122. *Id.* at 294.

123. It is sometimes unclear, in *Law's Empire*, whether Dworkin really rejects skepticism about law's determinacy, since his theory of interpretation could be taken as an attempt to describe how lawyers think about the law in the absence of determinate guidelines. Nevertheless, Dworkin always comes back to insisting that the position that there "is never one right way, only different ways, to decide a hard case . . . is either a serious philosophical mistake . . . or . . . a contentious political position resting on dubious political convictions . . ." DWORKIN, *supra* note 15, at 412.

institutional method of attacking the fact/value distinction by attempting to describe a legal practice analogous to promising—the practice of interpretation—and distinguishing between internal and external skepticism of that institution.[124] Dworkin claims that the task of the lawyer is interpretation, an intrinsically value-laden project of "imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[125] Dworkin's idea is that, while it is true that one does not need to accept an institution to criticize it, external criticism of an institution is somehow ineffective. Dworkin's presentation is rather unclear, but his external/internal skeptical distinction appears to be analogous to the following sort of skepticism. An external skeptic of Euclidean geometry doubts that it is objectively true. An internal skeptic doubts that any, or certain, theorems can be derived within Euclidean geometry. Dworkin wants to ignore the first sort of skeptic, roughly on the grounds that, while we are engaged in a practice, we just do it, we do not step outside it and judge it.[126] Ignoring the external skeptic in this way cannot solve the problem of indeterminacy.

Suppose the positivist is the skeptic. The positivist believes that in some cases the law is clear, while in other, hard cases, there is "no right answer." Is the positivist an external or an internal skeptic? As to the easy cases, the positivist is neither. He would probably not disagree with Dworkin's description of how a judge determined the law, and if he did, not much would hang on the disagreement. Moreover, the positivist would believe, based on linguistic facts independent of Dworkin's theory, that the judge's assertion of the law was objectively true. In the hard case, the positivist would be both an internal and an external skeptic. The positivist would not accept that the interpretive method could identify one answer as right, so the positivist would be an internal skeptic. Moreover, the positivist would not believe that there is an "objective" answer somehow "out there," even though our methods for finding answers give out in hard cases, so the positivist is an external skeptic. These two skepticisms are thematically (although not logically) related—if one believes there is a reality somehow independent of and underlying the practice of reasoning about the law, one has reason to have hope that however confused things may look in practice, over the years we will be able to come closer and closer to that reality. On the other hand, if one believes, like the skeptic, that law is just a practice or convention, there is no reason to believe, contrary to appearances, that at some point in the future we must be able, finally, to discover the real answers.

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124. *Id.* at 82-86.

125. *Id.* at 52.

126. *Id.* at 83 ("The practices of interpretation and morality give these claims all the meaning they need or could have.").

Another way of seeing the force of external skepticism is to reflect on Dworkin's claim that "[t]he practices of interpretation and morality give these claims all the meaning they need or could have."[127] In some sense, this is an uncontroversial claim for a conventionalist or a holist concerning linguistic theory to make. Yet this claim does not do what the idealist needs it to do. Consider another practice: workers in a gang putting down sandbags to reenforce a levee. Jones yells "Bag!" Smith hands Jones a sandbag. Jones lays the sandbag along the levee. Jones yells "Bag!" Here the practice of Smith and Jones gives "Bag!" all the meaning it needs or could have. We stipulate that sandbags, the levee, and Smith and Jones exist, so there is no place for external skepticism. Nonetheless, this practice is open to external skepticism analogous to the skepticism of the legal positivist. For what happens if Jones yells "Bag!" even though he can see that Smith has no more bags? What happens if Jones whispers "Bag"? What happens if Smith slides the bag along the ground instead of handing it to Jones? We cannot say. These actions are not already included in the pre-existing practice.[128] The claim that an action is not already included in the pre-existing practice is precisely the claim that skeptics about hard cases make about the law.

Finally, Dworkin claims that interpretation is not only a practice, but it is, in fact, a "constructive" practice.[129] Presumably, a "constructive" practice may be immune from skepticism that any particular instance of the practice is not "already a part of" the practice, since the whole point of the practice is to construct. The game of chess may be considered a constructive practice. Every game is new—no game is played until the moves are made. Different ideas can be tried out. Players will disagree about whether the ideas are good. Players will give reasons to one another in the form of move and counter-move. The dispute will be settled over the board. Someone might claim that there is no "right answer" to the question of whether a certain sequence of opening moves is decent. That claim would be internal skepticism about chess. Yet over a series of games using that line of moves it will become apparent[130] whether that line of moves favors neither side or advantages Black or White to some degree. There are two features of the practice of chess that make this kind of judgment possible. First, chess has rules that determine what moves can be made. Second, chess has rules that determine whether a game is over, and if so whether White has won, Black has won, or the game is a draw. The internal skeptic about interpretation simply doubts

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127. *Id.*

128. *See, e.g.*, WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 23, § 68, at 32-33 ("'But then the use of the word is unregulated, the "game" we play with it is unregulated.'—It is not everywhere circumscribed by rules; but no more are there any rules for how high one throws the ball in tennis, or how hard; yet tennis is a game for all that and has rules too.").

129. DWORKIN, *supra* note 15, at 52-53.

130. In reality, chess is such an extraordinarily complex game that relatively few such questions are settled in practice.

whether we can identify such hard and fast rules for "reasoning" about the law.

In sum, just as a notion of respect is compatible (although external) to a realist theory so are notions of illegal influence and good faith. Moreover, the realist is not trapped by use of these notions into admitting that there must, after all, be an idealist decision procedure, because the realist metaphysic is not itself committed to any particular decision procedure and the idealist cannot show that an idealist decision procedure is determinate in all cases.

3. Argument 3: The Principle of Partisanship

Nevertheless, Luban believes he has shown that the illegal influence and good faith suggestions must somehow be circular. Luban next argues that the realist, in claiming that the judge's good faith interpretation of the law is the law, no matter what that interpretation is (believed by Luban to be a consequence of the circularity argument), is giving himself a false justification for the principle of partisanship. The argument is as follows:

> 1) If my [the lawyer's] good faith interpretation of the law differs from the judge's, it is the judge's interpretation that is correct;
>
> therefore
>
> 2) I should be agnostic about the law;
>
> therefore
>
> 3) There is nothing illegitimate about promoting the point of view most consistent with my client's interests;[131]
>
> therefore
>
> 4) Since I am my client's agent, I should adopt the principle of partisanship, that I must, within the established constraints of professional behavior, maximize the likelihood that the client will prevail.[132]

While Luban does not believe this is a valid argument,[133] he does not recognize that the flaws in the argument allow a realist, as well as an idealist, to disavow the principle of partisanship.

a. *Proposition 1*

Luban wants to say that the argument is unsound because realism is false. Luban assumes that realism is false, that there is one true theory of

131. LUBAN, *supra* note 30, at 27.
132. *Id.*
133. *Id.*

the law, and also one true decision procedure. He therefore contends that proposition 1 is false, because the judge may actually be interpreting the law in bad faith.[134] If the judge interprets the law in bad faith, he would not be following Luban's idealist decision procedure. On the other hand, the mere fact that the judge decides for whom to hold in a frivolous or unethical way does not mean that the legitimating rhetoric the judge uses in his opinion will be inconsistent with established law. There is a distinction between how a decision is made and whether it is correct. Even if there is a decision procedure that will yield a correct result, whether the result is correct is a separate issue from whether the decision procedure was followed, or the result reached by happenstance. Even if a judge acts in bad faith, the ruling may be correct. Hence, proposition 1 is not necessarily false, even if the judge is assumed to be acting in bad faith and an idealist theory is assumed to be true.

Moreover, viewed against the backdrop of the more sophisticated legal realist model discussed above, in which the decision is deemed to be the decision of the entire court system, not just one judge and one court, proposition 1 does not seem that implausible. For example, no matter how fervently one may believe that *Hans v. Louisiana*[135] interpreted the Eleventh Amendment in bad faith, and in flagrant contradiction to the plain language of the amendment, since the federal judiciary has followed *Hans* since it came down, it is perfectly reasonable to assert that the *Hans* case is the law. Likewise, any other holding consistently followed by the entire judicial system is the positive law, regardless of its theoretical justification or the manner in which it was reached.

b. *Linking Proposition 1 to Proposition 2*

Luban wishes to show that the bad conclusion of proposition 4 is necessarily derived from the error of embracing the false proposition 1. Hence, Luban wants to bridge the gap from an "is" to an "ought," by showing that proposition 2 follows from proposition 1. Whether I should be agnostic about the law is a matter of ethical or prudential principles applied to my beliefs about the world. Hence, a realist who believes proposition 1 might nevertheless believe that lawyers' good faith interpretations of the law tally with judges' interpretations often enough that, as a matter of practical advantage, the lawyer is better off predicting the law accurately most of the time and being wrong some of the time, than being an agnostic.

To link proposition 1 with proposition 2, Luban may have some skeptical argument in mind such as the following. Whatever theory I use to predict what the law may be, I may be wrong, since the judge may disagree with me. Since whatever I think about the law may be wrong, I

134. *Id.*
135. 134 U.S. 1 (1890).

do not know anything about the law for certain. Since I do not know anything about the law for certain, I should be agnostic since it would be lying about my state of knowledge to assert the truth of a legal proposition. While this argument is consistent, it is based on an extreme skepticism—that unless I "know for certain," I cannot rely on my opinions. We may contrast this attitude with that of a scientist who only provisionally accepts even the most well-confirmed theory, pending potential experimental or observational disconfirmation. The scientist does not remain practically agnostic about the provisionally accepted theory, but acts on it and builds on it, unless and until it is disconfirmed.

Nevertheless, it is natural for Luban to set up extreme skepticism as the adversary position, because he believes he has a ready-made reply. Luban believes that law must be "self-explanatory."[136] In Luban's model, law is not like science, but like logic. The idealist can adduce the law through reason and hence know what the law is, independent of the judge. Luban's model leaves no purchase for the most extreme skeptic.

The extreme remedy (requiring law to be "self-explanatory") is not necessary to address extreme skepticism. There are many tenable positions for both the idealist and the realist that lie in between the extremes. Hence, the agnosticism of proposition 2 is not a necessary consequence of proposition 1.

c. *Linking Proposition 2 to Proposition 3*

Proposition 3 does not follow directly from proposition 2. Another evaluative premise or set of premises is needed to bridge the gap. One premise is needed to flesh out the meaning of "illegitimate." If "illegitimate" is taken to be synonymous with unethical, a whole set of premises is needed to bridge the gap from lack of belief about the law to lack of ethical responsibility for the client's interests. To see this, all we need do is reflect that seemingly the sole relevant propositions entailed by proposition 2 are:

> Proposition 2') I should be agnostic about whether my client's interests are inconsistent with the law;
>
> and
>
> Proposition 2") In advocating my client's position, I am not knowingly advocating a position inconsistent with the law.

It seems at first glance unobjectionable to maintain that it is unethical for a lawyer to knowingly advocate a position inconsistent with the law, so agnosticism saves a lawyer from one type of unethical conduct associated with partisanship.

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136. LUBAN, *supra* note 30, at 18.

The most direct opposition to the principle of partisanship comes from the theory of role morality that holds one morally accountable for the interests of one's clients (at least if one is directly and knowingly working to advance those interests). Luban refers to this theory in his discussion of the case of the wicked uncle.[137] This theory is indifferent to the happenstance that a client's intermediate goal, for example, that a suspected murderer be prosecuted,[138] is legal, so long as the motive or end result is morally suspect. In the case of the wicked uncle, the morally suspect goal of depriving an heir of his inheritance seems to outweigh that lawful act of prosecuting a man for murder on the basis of colorable evidence that he committed the crime. This theory is perfectly consistent with the realist agnosticism about the law posited by Luban. An agnostic view about the law need not be an agnostic about the morality of one's interests. Therefore, Luban's attacks on the principle of partisanship fail to show any necessary moral deficiency in the extreme realist/skeptical position he sets up as an adversary.

VI. INDETERMINIST ETHICS

In general, the idealist's need to attack skepticism rests on an unwillingness to appeal to principles of morality separate from law when giving an account of the role of law in society. Luban's need to attack realism rests on his unwillingness to appeal to principles of morality explicitly independent from a theory of law in his account of professional ethics. If Luban would allow for a morality independent of law, he would have an independent platform for assessing the role morality of the lawyer. Luban introduces the value of respect for the law, but he makes that value parasitic upon the notion of law itself. His notion of a "generality requirement" to be placed on law is itself value neutral, since it calls for the law to be generally beneficial.[139] Therefore any substantive value system specifying what is beneficial may be used to supply substance to the "general benefit" requirement.

Since Luban does not want to use substantively moral premises to attack the principle of partisanship, he is forced to use the only other kind of premises at hand, namely premises describing the legal/metaphysical world. Luban strives to bridge the is/ought gap to argue that a false metaphysics is responsible for a troubling ethical theory. Such a methodology unfairly dismisses an interesting metaphysical theory (legal realism) and fails to uncover the valid (substantive ethical) reasons we may have to oppose the principle of partisanship.

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137. *Id.* at 3-10; *see also id.* at 6 (Burroughs' cross-examination of Gifford). In the case of the wicked uncle, the heir to a stolen estate returned from America to England. *Id.* at 3. Unfortunately, the heir shot a man to death after his return. *Id.* The man that had wrongfully taken title to the estate instructed his lawyer to prosecute the returning rightful heir for murder. *Id.* Of course the real goal of the usurper was not to see justice done, but to retain the wrongfully obtained title to the estate.

138. *Id.* at 3.

139. *Id.* at 30, 43-49.

Looking at the attitudes of actual realist and critical scholars towards the law and the lawyer's role shows that idealists either misunderstand or misdescribe the moral concerns of skeptics, labeling skeptics as nihilists.[140] Contrary to critics such as Dworkin who misleadingly accuse legal skeptics of moving "toward a new mystification in service of undisclosed political goals,"[141] legal skeptics have been quite vocal about their political goals. Legal skeptics advance the indeterminacy thesis not because they lack moral feeling, but precisely because they feel that a determinate, univocal theory of law deprives legal practice of its moral content. Oliver Wendell Holmes, the source of Luban's definition of realism, argued that the common law grows through the court's legislative considerations of "what is expedient for the community concerned."[142] Holmes argued for a "more conscious recognition of the legislative function of the courts,"[143] which would lead to more self-consciously moral argument. Similarly, the realist Felix Cohen criticized the then dominant formalist jurisprudence on the ground that "[i]ts actual effect is to exclude the conscious consideration of ethical issues from the judicial mind and to lend weight to the unconscious and uncritized value standards by which judges decided what they *ought* to do."[144] Cohen complained that formalism substitutes logical consistency for true ethical standards and advocated a self-conscious consideration of morality in judicial decision making.[145] These realist thinkers mixed metaphysics and ethics as much as the idealists, but with an important difference. They did not pretend that any ethics followed from their conception of the law. Rather they made room in their conception of the law for a consideration of morality derived independently of legal theory.

Critical legal studies scholars also attempt to inject moral considerations into legal reasoning. Peter Gabel and Paul Harris have a three step recommendation for lawyers to deal with the legal system: 1) "develop a relation of genuine equality . . . with the client"; 2) "demysti[fy] the symbolic authority of the State" as exemplified through the trappings of the law; and 3) reshape the way the law represents conflicts, bringing out "the true socioeconomic and political foundations of legal disputes."[146] While grounded in an explicit disrespect of the law and its dominant idealogy, these recommendations are profoundly moral in their tone and argue for an ethical commitment far greater, if far different, than that of the ordinary lawyer. Roberto Unger, perhaps the leading voice for societal transformation in the critical school, offers similar suggestions, desiring to "transform legal doctrine into one more area for

140. *See supra* text accompanying notes 1-19.
141. DWORKIN, *supra* note 15, at 275.
142. O.W. HOLMES, THE COMMON LAW 35 (1881).
143. *Id.* at 36.
144. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 214 (1931).
145. *Id.* at 220.
146. Gabel & Harris, *supra* note 111, at 376.

continuing the fight over the right and possible forms of social life."[147] The transformation will take place through an "internal development" in which the ideal conflicts of law are exploited to transform the actual law bit by bit, first changing the law, then revising ideal conceptions in light of that change, then working for more change.[148]

The point of these examples is not that the left-wing social ethics of critical legal scholars are superior, but rather that these ethics are consistent with critical metaphysics, while being inconsistent with, and hostile to, nihilism in general and the principle of partisanship in particular. In short, it turns out that these skeptical scholars may not fit into the anti-establishment schema described above. On closer inspection, these scholars join a skeptical metaphysics with a nonskeptical ethics that requires lawyers to make moral judgments and take responsibility for their actions in serving their clients.

Luban could have expressed his ethical concerns in more "realist" language, but doing so would have forced him to introduce values extrinsic to the law. The first notion he needs is the law as it should be. Each realist lawyer is entitled to have that notion. The notion could be the provisional, ever subject to revision, notion of ideal morality that Unger favors, or a more traditional, static ideal morality. The second necessary notion is the relation between the law as it should be and the law as it actually is. Finally, Luban needs role-specific notions such as the notions that the lawyer should be loyal to his client and the citizen should be loyal to society. The realist lawyer's role conflicts may get worked out among these conflicting values. Luban's ethical theory could then be reconstructed. The law as it should be would provide the (as close as possible) univocal theory of true morality, the realization of which is the lawyer's goal. The lawyer would attempt to realize the true morality by working through the law as it is, pulling it and pushing it at the margins to be ever closer to its ideal form. As an agent for his client, the lawyer will be loyal, representing only those clients whose problems require that he work to effect morally beneficial change.

It is no accident that a skeptical reconstruction of an "idealist" ethics sounds a lot like the recommendations of Gabel and Harris, or Unger. Both legal realism and Critical Legal Studies are critical movements, and a critical movement is at heart a moral enterprise. The idealist's error is to identify a lack of intellectual respect for a certain style of legal theory with a lack of moral sensibility.

147. Unger, *supra* note 84, at 579.
148. *Id.* at 580.